

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JORGE CORDOVA)	
Claimant)	
VS.)	
)	Docket No. 192,123
SPICE MERCHANT & CO.)	
Respondent)	
AND)	
)	
STATE FARM FIRE & CASUALTY COMPANY)	
Insurance Carrier)	

ORDER

Respondent appealed the Award entered by Assistant Director Brad E. Avery on December 3, 1996. The Appeals Board heard oral argument on May 9, 1997, in Wichita, Kansas.

APPEARANCES

Claimant appeared by his attorney, Joseph Seiwert of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, James A. Cline of Wichita, Kansas. There were no other appearances.

RECORD

The Appeals Board considered the record listed in the Award of the Assistant Director.

STIPULATIONS

The Appeals Board adopted the stipulations listed in the Award of the Assistant Director except for respondent's stipulation that claimant's accidental injury arose out of and in the course of his employment with the respondent. However, respondent did not seek to withdraw its stipulation that the relationship of employer and employee existed on the date of accident.

ISSUES

Respondent requested the Appeals Board to review the following issues:

- (1) Whether respondent should be permitted to withdraw its stipulation that claimant's accidental injury arose out of and in the course of his employment with respondent.
- (2) Whether claimant's status as an illegal alien, at the time he entered into the employment contract with respondent, precludes coverage under the Workers Compensation Act.
- (3) The nature and extent of claimant's disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs, and hearing the arguments of the parties, the Appeals Board finds as follows:

Claimant injured his left knee and chest on June 14, 1994, while working as a construction laborer for respondent. The respondent provided claimant with medical treatment through a number of physicians from the date of the accident until he met maximum medical improvement on July 6, 1995. Also, respondent paid claimant temporary total disability compensation for a total of 54 weeks. On the date of the regular hearing, June 10, 1996, claimant was not employed and had not been employed since the date of the accident.

The Assistant Director awarded claimant a permanent partial general disability in the amount of 80.5 percent based on the two-prong work disability test contained in K.S.A. 44-510e, i.e., the loss of claimant's ability to perform work tasks averaged together with the difference between claimant's preinjury and post-injury average weekly wage. The respondent first argues that claimant is not entitled to compensation benefits provided by the Workers Compensation Act because claimant was an illegal alien at the time of his employment. Second, the respondent contends if the Workers Compensation Act does apply to claimant, then claimant's entitlement to permanent partial disability benefits is limited to his left knee injury, a scheduled injury listed in K.S.A. 44-510d.

In contrast, claimant argues respondent should not be permitted to withdraw its stipulation that claimant's accidental injury arose out of and in the course of his employment. Furthermore, claimant contends his illegal alien status is irrelevant because there is no causal relationship between claimant's alleged fraud and misrepresentation and his injuries. The claimant argues that he is entitled to a work disability and requests the Appeals Board to affirm the Assistant Director's Award for an 80.5 percent permanent partial general disability.

(1) The Assistant Director denied respondent's request to withdraw its stipulation that claimant's accidental injury arose out of and in the course of his employment with the respondent. The Assistant Director found the question of whether the employment relationship between claimant and respondent was based on fraud was beyond the scope of the Workers Compensation proceeding.

The Appeals Board disagrees with the Assistant Director and finds the issue raised by the respondent is whether the Workers Compensation Act applies to an illegal alien. Accordingly, the Appeals Board concludes that a question of whether the Workers Compensation Act applies to a party is an appropriate question to be addressed in a Workers Compensation proceeding.

The Appeals Board has been, and will be in the future, reluctant to permit a party to withdraw a stipulation. However, when fraud or misrepresentation is discovered during the litigation of a Workers Compensation case and after stipulations have been taken, as occurred in this case, the Appeals Board finds that it is appropriate to allow the stipulation to be withdrawn and the arguments of the party requesting the withdrawal to be considered.

Claimant testified he entered the United States illegally in 1990. He further admitted, at the time he was hired by the respondent on May 31, 1994, he had attested under penalty of perjury that he was an alien authorized to work until April 10, 2002, and presented to the respondent a falsified Resident Alien Card and Social Security Card. He purchased the forged documents in Mexico before entering this country. Also, he testified, during his deposition on August 13, 1996, he had not applied for United States citizenship and, even at that time, did not have a lawful permit to work in the United States.

Respondent points out that the liability of an employer to an injured worker arises out of the employment contract and the injured worker must recover on the contract. See Eakes v. Hoffman-LaRoche, Inc., 220 Kan. 565, 552 P.2d 998 (1976). Respondent contends since claimant fraudulently represented to the respondent that he was a legal alien with proper documents permitting him to work in the United States at the time he and the respondent entered into the employment contract, then the contract is void and claimant is not entitled to coverage under the Workers Compensation Act.

The Appeals Board concludes the employment contract entered into between the claimant and the respondent did not change the employee/employer relationship for purposes of the Workers Compensation Act. For the employment contract to be void, for purposes of workers compensation coverage, the alleged fraud would have to have a causal relationship to claimant's injury. See White v. Thompson, 181 Kan. 485, 312 P.2d 612 (1957). This conclusion is also supported by Professor Larson in 3 Larson's Workers' Compensation Law § 47.51 (1997), where he states that even if the employment contract is illegal, in the sense the making of the contract was illegal, workers compensation benefits should still be allowed. The Appeals Board finds claimant's fraud or misrepresentation stemmed from his procurement of the employment contract. The fraud or misrepresentation

did not have a causal relationship to claimant's injuries and, therefore, claimant is entitled to coverage under the Workers Compensation Act.

(2) Although claimant, even as an illegal alien, is entitled to the benefits provided by the Workers Compensation Act, the Appeals Board finds in this case claimant's entitlement to permanent partial disability benefits is limited to his permanent functional impairment and he is not entitled to the higher work disability benefits. See K.S.A. 44-510e.

Claimant admitted he presented a falsified work permit and other falsified documents to the respondent at the time he was employed by respondent. Claimant, at his deposition taken on August 13, 1996, still did not have the necessary documents to be legally employed in the United States. Therefore, claimant cannot lawfully apply for employment and employers cannot lawfully employ the claimant.

The Appeals Board has already had an opportunity to address the issue of whether or not a claimant, who is an illegal alien, is eligible under the Workers Compensation Act for a work disability. The Appeals Board, in the case of Ortez v. Nies Construction Company, Inc., Docket No. 199,812 (August 1997), found if claimant would have had a legal status, the respondent would have returned claimant to work at a comparable wage. Accordingly, the Appeals Board imputed a comparable wage to the claimant and limited claimant to functional impairment as provided by K.S.A. 44-510e.

The Appeals Board finds the claimant should be limited to permanent partial disability benefits based on his functional impairment rating. The respondent did not offer claimant a job within his restrictions at a comparable wage after he was released from medical treatment. However, claimant did not apply for a job with respondent and the job claimant was performing at the time of his injury was not available because it had been completed. Claimant's permanent restrictions imposed by his treating and evaluating physicians range from allowing medium work to allowing him to perform up to heavy work. Claimant's average weekly wage at the time of his injury was only \$200 per week. Claimant's illegal alien status disqualifies him from obtaining any type of gainful employment in the United States. However, claimant's minimum restrictions and low preinjury average weekly wage would otherwise permit claimant post-injury to at a minimum earn minimum wage of \$5.15 per hour or \$206 per week. Therefore, the Appeals Board finds it is appropriate to impute the \$206 weekly wage to the claimant for a post-injury wage limiting his entitlement to permanent partial disability benefits to his functional impairment rating. See K.S.A. 44-510e and Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, ___ P.2d ___ (1997).

The Assistant Director found claimant's permanent functional impairment was 9 percent to the body as a whole based on the rating given by Lawrence R. Blaty, M.D. Dr. Blaty, at the request of claimant's attorney, examined the claimant and reviewed his extensive medical treatment records for the purpose of assessing claimant's permanent functional impairment rating and restrictions. Dr. Blaty concluded claimant suffered, as a result of his work-related accident, permanent injury to his left-lower extremity and to his chest. The Assistant Director chose Dr. Blaty's permanent whole body functional impairment rating over the other testifying physician, Michael H. Munhall, M.D., who only rated claimant's

left-lower extremity. The Appeals Board agrees with the Assistant Director and adopts his analysis contained in his Award in regard to that finding.

The Appeals Board, therefore, finds claimant is not entitled to an award based on a work disability because of his illegal alien status. However, the Appeals Board concludes claimant is entitled to an award of permanent partial disability benefits based on a 9 percent permanent functional impairment.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Assistant Director Brad E. Avery dated December 3, 1996, should be, and is hereby, modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Jorge Cordova, and against the respondent, Spice Merchant & Co., and its insurance carrier, State Farm Fire & Casualty Company, for an accidental injury which occurred on June 14, 1994, and based upon an average weekly wage of \$200.

Claimant is entitled to 54 weeks of temporary total disability compensation at the rate of \$133.34 per week or \$7,200.36, followed by 33.84 weeks of permanent partial disability compensation at the rate of \$133.34 per week or \$4,512.23 for a 9% permanent partial general disability, making a total award of \$11,712.59, all of which is currently due and owing.

All remaining orders of the Assistant Director contained in the Award are adopted by the Appeals Board as if specifically set forth in this Order.

IT IS SO ORDERED.

Dated this ____ day of December 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Joseph Seiwert, Wichita, KS
James A. Cline, Wichita, KS
Nelsonna Potts Barnes, Administrative Law Judge

JORGE CORDOVA

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DOCKET NO. 192,123

Philip S. Harness, Director